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No. 07-1425

FILED
JUN 16 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

BETTY TURNER,

Petitioner,

v.

PERRY COUNTY COAL CORPORATION
and HOMER YOUNG,

Respondents.

On Petition For Writ Of Certiorari
To The Kentucky Court Of Appeals

BRIEF IN OPPOSITION ON BEHALF OF PERRY COUNTY COAL CORPORATION, RESPONDENT

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QUESTION PRESENTED

Whether a state court is justified in not allowing a child born out of wedlock to inherit from the child's father under the state's law of intestate succession where the father died in 1962, more than 40 years prior to the child asserting her claim and more than 15 years prior to the date this Court decided *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

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STATEMENT OF THE CASE

The Petitioner, Betty Turner (hereinafter "Turner"), asserts she is the sole heir of John B. Combs and is therefore the sole owner of the real property he owned at his death on Browns Fork of Big Creek in Perry County, Kentucky (hereinafter the "Real Property"). Turner was born out of wedlock in 1932. It is undisputed that she is the daughter of John B. Combs who died intestate in 1962 when Kentucky Revised Statute (KRS) §391.090(2) (repealed in 1986) provided that a child born out of wedlock could not inherit from his or her father.

In 1967 an Affidavit of Descent was recorded as required by KRS §382.120. An Affidavit of Descent is the recorded instrument which completes the chain of title to real estate when the owner dies intestate. The Affidavit of Descent identifies the heirs of John B. Combs as his second cousins and did not mention Turner.

In 2004, in reliance on the recorded Affidavit of Descent, the Respondent, Perry County Coal Corporation (hereinafter "Perry County Coal"), purchased a 40% undivided interest in the Real Property by three (3) separate deeds from certain of the heirs of John B. Combs who were named in the recorded Affidavit of Descent. The total purchase price paid by Perry County Coal for the three (3) conveyances was $39,166.00.

Turner testified in the proceedings below that she had not visited the Real Property and had made no

inquiries about the Real Property since the death of John B. Combs. Turner testified that, "I just didn't think about it at all".

In August of 2005, Perry County Coal initiated a civil action in the Perry Circuit Court seeking an adjudication of the ownership of the Real Property and a partition of the Real Property. The civil action named all the heirs, both known and unknown, of John B. Combs, and also named Turner as a defendant because she was someone "who may be claiming an interest in the property". Turner filed a counterclaim and a cross-claim in the action below claiming she was the sole heir of John B. Combs, and therefore was the sole owner of the Real Property. Homer Young, a Respondent herein, also filed a counterclaim and cross-claim claiming to be an owner of the Real Property as a result of being an heir of John B. Combs and by adverse possession.

It is undisputed that from the date of John B. Combs' death in 1962 until the three (3) conveyances transferring the undivided 40% interest in the Real Property by certain of the heirs of John B. Combs to Perry County Coal in 2004, there were no legal actions concerning the Real Property and no conveyances of any interest therein by anyone.

In the proceedings below the parties filed cross-motions for Summary Judgment. The Perry Circuit Court ruled KRS §391.090 was in effect on the date of John B. Combs' death and provided a child born out of wedlock shall inherit only from his mother unless the

father marries the mother and recognizes the child as his. Based on the above stated facts, the Perry Circuit Court ruled Turner's claims were barred by the holding in *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1978), (hereinafter "*Pendleton II*"), and stated as follows:

> Accordingly, although Defendant, Betty Turner, is the child of John B. "Buck" Combs, and her claims were brought within the limitations period, set forth in KRS §413.010, her claims are barred by the holding in *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1978), (hereinafter referred to as *Pendleton II*), wherein the Supreme Court of Kentucky adopted a prospective only application rule of the holding of the Supreme Court of the United States in *Trimble v. Gordon*, 430 U.S. 762 (1977), by holding that "its opinion shall have no retroactive effect upon the devolution of any title occurring before April 26, 1977, except for those specific instances in which the dispositive constitutional issues raised in this case was then in the process of litigation". *Pendleton II* at 539.

A copy of the Summary Judgment entered by the Perry Circuit Court is attached to the Petition for Writ of Certiorari in Appendix A.

The Perry Circuit Court granted Summary Judgment in favor of the Respondents herein, Perry County Coal and Homer Young, and dismissed Turner's counterclaim and cross-claim.

Turner appealed the Perry Circuit Court's Summary Judgment to the Kentucky Court of Appeals which held that the law in Kentucky is that "upon the death of a person intestate, title to his real estate immediately vests in his heirs at law", citing *Rose v. Rose*, 296 Ky. 18, 22, 176 S.W.2d 122, 124 (1943). The Court of Appeals held that upon the death of John B. Combs in 1962 the Real Property immediately passed to his heirs at law "under the then existing laws of intestate succession". The Kentucky Court of Appeals refused to apply the Kentucky Supreme Court's ruling in *Pendleton II* to this case because *Pendleton II* had "no retroactive effect upon the devolution of any title occurring before April 26, 1977, its striking down of KRS §391.090(2) did not, and may not now, have an effect upon the title to the subject property".

The Court of Appeals in this case further went on to discuss the applicability of *Reed v. Campbell*, 416 U.S. 52, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986), (hereinafter "*Reed*"), and held as follows:

> The facts in this case are distinguishable from those in *Reed*. In *Reed*, the illegitimate child's claim was made while the estate remained open in the probate court. Here, the decedent had been dead for over 40 years. In accordance with the aforementioned language in *Reed*, we conclude that the state's interest in finality provides justification for barring Turner's claim. In short, the rule stated by our supreme court in *Pendleton II* was not changed by the U. S. Supreme Court in *Reed*.

Perhaps the most important finding by the Kentucky Court of Appeals was its statement referring to when Perry County Coal purchased several undivided interests in the Real Property in 2004 it was "relying on the 1967 affidavit of descent".

The Opinion Affirming entered by the Kentucky Supreme Court is attached to the Petition for Writ of Certiorari in Appendix B.

Turner filed a Motion for Discretionary Review with the Kentucky Supreme Court which was denied and the Motion for Writ of Certiorari was thereafter filed by Turner requesting that the United States Supreme Court overturn the decisions of the Kentucky courts. A copy of the Order entered by the Kentucky Supreme Court denying Turner's Motion for Discretionary Review is attached to the Petition for Writ of Certiorari in Appendix C.

REASONS FOR DENYING WRIT OF CERTIORARI

THE KENTUCKY SUPREME COURT'S ORDER AND THE KENTUCKY COURT OF APPEALS' OPINION DO NOT FOLLOW A PROSPECTIVE ONLY APPLICATION OF *TRIMBLE* AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR THE DECISIONS OF OTHER STATE COURTS

Turner incorrectly states that the "sole" basis for the Kentucky Court of Appeals' Opinion and the

Kentucky Supreme Court's Order denying the Motion for Discretionary Review was that her father died prior to April 26, 1977, the date this Court decided *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) (hereinafter "Trimble"). In fact, the Kentucky Court of Appeals evaluated the facts of the case and compared them to the facts in *Reed* and made the following determinations: (i) Perry County Coal "relied" on the 1967 Affidavit of Descent when it purchased several undivided interests in the property; (ii) The decedent (John B. Combs) had been dead for over 40 years when Turner first made her claim; (iii) In Kentucky, title to real estate immediately vests in the decedent's heirs at law upon the decedent's death; and (iv) The state's interest in finality provided justification for barring Turner's claim.

The Kentucky Court of Appeals closely considered the decision of the United States Supreme Court in *Reed* and found that the facts in *Reed* did not resemble the facts in the present case. The United States Supreme Court in *Reed* did not state that *Trimble* must be applied retroactively in all cases. In fact, *Reed* and all the state court cases cited in the Petition for Writ of Certiorari are based on very limited factual circumstances, none of which are applied by the Petitioner to the facts of this case. Brief descriptions of the cases cited by the Petitioner, all of which cite *Trimble*, and some of which apply *Trimble* retroactively, are as follows:

1. *Reed v. Campbell*, 416 U.S. 52, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986)

   One year prior to the "illegitimate" child appellant's birth her parents had a ceremonial marriage. The marriage was later invalidated because the father's divorce from his previous wife was not yet finalized. The father died four months prior to this Court's decision in *Trimble* and the estate was still open when the "illegitimate" child asserted her claim. Under the above facts the Court applied *Trimble* retroactively.

2. *Marshall v. Marshall*, 670 S.W.2d 213 (Tenn. 1984)

   The father died in 1975 and lawsuits amongst the family involving the subject property's descent were ongoing in 1978. The court allowed retroactive application of *Trimble* only where there would be no hardship on innocent purchasers for value who had justifiably relied upon the old precedent.

3. *Williamson v. Gane*, 176 W.Va. 443, 345 S.E.2d 318 (1986)

   The father died in late 1974 and lawsuits amongst the family involving the subject property's descent were ongoing in 1983. The appellate court reviewed the trial court's denial of the illegitimate children's motion to intervene. The court stated it would not retroactively apply *Trimble* where there was justifiable detrimental reliance on the old law, where the property had been transferred

to an innocent purchaser for value or where the estate was not subject to further resolution. The West Virginia court remanded the case to the lower court for determination of the facts as they apply to the principles set forth in the decision.

4. *Mitchell v. Hardwick*, 297 S.C. 48, 374 S.E.2d 681 (1988)

   The father died in 1975 a year after having acknowledged the illegitimate child as his son in a signed and recorded deed. No transfers of the estate property had occurred and the estate's administration had not been completed. The court stated it would not apply *Trimble* retroactively where there was justifiable detrimental reliance on the old law by an innocent purchaser for value, where the paternity of the child had not been conclusively established or where the estate was not subject to further resolution, none of which were present in this South Carolina case.

5. *Kau Agribusiness Co., Inc. v. Heirs of Assigns of Ahulau*, 105 Haw. 182, 95 P.3d 613 (2004)

   The plaintiff corporation was the remote successor in interest of the siblings of the father who died in the 1930's. Many transfers of the property had occurred and the court denied to grant the illegitimate children an interest in the property. The court adopted the reasoning and requirements of *Mitchell v. Hardwick* above and specifically cited it and the requirements set forth therein. The

> Hawaii court found that the children did not meet the tests set forth in *Mitchell v. Hardwick* and did not apply *Trimble* retroactively.

The Petitioner does not apply any of the principles cited in the above cases to the facts of the present case. In the facts at hand the father, John B. Combs, died in 1962 and the Affidavit of Descent was recorded in 1967. Perry County Coal "relied" on the validity of the recorded Affidavit of Descent when it purchased an undivided 40% interest in the property through three (3) separate deeds from the heirs stated in the Affidavit of Descent. There was no litigation pending at the time of the 2004 conveyances. The above facts do not satisfy any of the requirements of any of the cases referenced by the Petitioner, and therefore, the Kentucky courts were correct in not applying *Trimble* retroactively.

The Petitioner appears to be relying on *Reed* for her proposition that the holding of *Trimble* should be applied retroactively without limitation, which is not correct. The Perry Circuit Court and the Kentucky Court of Appeals closely compared the facts in *Reed* with the facts in the present case and the Kentucky Court of Appeals quoted the following provisions in *Reed* and based its decision thereon:

> [t]he state interest in the orderly disposition of decedents' estates may justify the imposition of special requirements upon an illegitimate child who asserts a right to inherit from her father, and, of course, it justifies the enforcement of generally applicable

> limitations on the time and the manner in which claims may be asserted. After an estate has been finally distributed, the interest in finality may provide an additional, valid justification for barring the belated assertion of claims, even though they may be meritorious and even though mistakes of law or fact may have occurred during the probate process.

The Kentucky Court of Appeals then distinguished *Reed* from the present case and held as follows:

> The facts in this case are distinguishable from those in *Reed*. In *Reed*, the illegitimate child's claim was made while the estate remained open in the probate court. Here, the decedent had been dead for over 40 years. In accordance with the aforementioned language in *Reed*, we conclude that the state's interest in finality provides justification for barring Turner's claim.

Nothing in its opinion and the heretofore cited facts discussed by the Kentucky Court of Appeals suggests that the sole reason for its decision was that Turner's father died before April 26, 1977. *Reed*, in effect, stated that *Trimble* should in certain limited factual circumstances be applied retroactively, but the facts of this case do not justify doing so and the Kentucky Court of Appeals and the Kentucky Supreme Court correctly so decided.

CONCLUSION

For the foregoing reasons, the Respondent, Perry County Coal Corporation, respectfully requests that the United States Supreme Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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